COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 036316-00**

Adam P. Carey (deceased)	Employee
Richard A. Carey and Margaret L. Carey	Claimants
Kernwood Country Club	Employer
Eastern Casualty Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, Maze-Rothstein and Levine)

APPEARANCES
Kevin T. Daly, Esq., for the employee
Mark Sullivan, Esq, for the insurer at hearing
Carl F. Schmitt, Esq., for the insurer on appeal
Martin B. Schneider, Esq., for the employer

COSTIGAN, J. The employee, Adam Carey, was sixteen years old, unmarried, and living with his parents at the time of his death from injuries sustained while working at the Kernwood Country Club. (Dec. 3.) His parents claimed G. L. c. 152, § 31, death benefits as dependents of their son. (Dec. 2.) The administrative judge found that the parents were conclusively presumed dependents of the employee under § 32(e), (Dec. 5), and awarded them § 31 benefits, but only from the employee's death on September 16, 2000 until March 2, 2002, which would have been his eighteenth birthday. (Dec. 10.) The decision is before us on the claimants' appeal. Because we conclude that the termination of § 31 benefits was contrary to law, we reverse that part of the decision, and order that payment of such benefits be made until the maximum statutory entitlement under § 31[1] is reached. We summarily affirm the decision as to all other issues argued

[1] General Laws c. 152, § 31, provides in pertinent part:

> The total payments due under this section shall not be more than the average weekly wage in effect in the commonwealth at the time of the injury . . . multiplied by two hundred and fifty plus any costs of living increases provided by this section. . . .

on appeal.[2]

General Laws c. 152, § 32, as appearing in St. 1950, c. 783, § 4, provides in pertinent part:

> The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee:
>
> . . .
>
> (e) A parent upon an unmarried child under the age of eighteen years; provided, that such child was living with the parent at the time of the injury resulting in death.

Based on the facts stipulated to by the parties and found by the judge, (Dec. 3, 5; Ex. 1), the Careys were entitled to the conclusive presumption of total dependency on their son's earnings at the time of his fatal injury.

General Laws c. 152, § 31, as appearing in St. 1998, c. 161, § 538, provides in pertinent part:

> If death results from the injury, the insurer shall pay the following dependents of the employee . . . compensation as follows, payable, except as hereinafter provided, in the manner set forth in section thirty-two.
>
> . . .
>
> In all other cases of total dependency, the insurer shall pay each person, wholly dependent upon the earnings of the deceased employee, for support at the time of the injury, or at the time of the employee's death a weekly payment equal to the weekly amount of that support but not more than two-thirds of the average weekly wage of the deceased employee or more than eighty dollars a week . . .

The judge determined that the conclusive presumption of parental dependency under § 32(e) ended when the employee would have become eighteen years old. (Dec. 6-7.)

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[2] The claimants also appeal the judge's denial of their § 28 claim, seeking a doubling of benefits, based on the alleged serious and willful misconduct of the employer. They contend that the golf cart their son was operating at the time of his injury was "a motor vehicle of any description," and that the employer violated G. L. c. 149, § 62, by permitting their minor son to operate it. The claimants further appeal the judge's finding as to the employee's pre-injury average weekly wage, and also urge that the case be recommitted to the administrative judge to rule on their attorney's motion for an enhanced legal fee. Seeing no merit in any of these contentions, we summarily affirm the judge's decision on these points.

He reasoned:

> Looking at c. 152 in its entirety, the dependency of a child, in most circumstances, ends on the eighteenth birthday [footnote omitted]; conversely, the dependence of a parent on the wages of a child is specifically limited to "an unmarried child under the age of eighteen years." There are no specified circumstances under which a parent would be presumed to be dependent upon a child over the age of eighteen. Any dependence, in whole or in part, shall be determined in accordance with the facts at the time of injury or death. Certainly, the parents are entitled to the presumption of dependence until the employee's eighteenth birthday. Thereafter, they would have to bring forward facts that would support a finding that further dependence, either total or partial, still existed. No evidence was brought forward that dependence of any nature extended beyond March 2, 2002.

(Dec. 7.) The judge also concluded that the § 31 maximum statutory entitlement to 250 times the average weekly wage in the commonwealth at the time of injury or death (see footnote 1, supra) did not apply to the dependent parents. (Dec. 5-6.) Addressing § 32, the judge explained:

> I find . . . that the phrase "under the age of eighteen" [in § 32(c), (d) and (e)] is itself a defining and limiting factor in all parts of § 32. This limitation to "under the age of eighteen years" becomes clearer when compared to the presumed dependence of a widow in § 32(a), or a widower in § 32(b), which are without a temporal limit. Likewise, most references to the rights of children under c. 152 are qualified by the words "under the age of eighteen years," from which it is clear that *age* is the limiting factor on dependency, rather than a specific dollar amount, or length of time, as specified in § 31, for widows, widowers, and "children under the age of eighteen." If there is claimed dependency of a parent on a child over the age of eighteen, it is not a conclusive dependency, and the parent must establish dependency in fact, [footnote citation omitted], which has not occurred in the present case. I find, therefore, that the whole and presumed dependency of a parent ends on the eighteenth birthday of the employee.

(Dec. 6; emphasis in original.) Thus, the judge awarded the parents only a closed period of § 31 benefits that terminated on March 2, 2002, which date would have been their son's eighteenth birthday, but for his work-related death on September 16, 2000. (Dec. 10.)

We disagree with the construction of §§ 31 and 32 advanced by the judge and advocated by the insurer in defense of the decision. We hold, as a matter of law, that if

there is at least one surviving parent, the conclusive presumption of parental dependency under § 32(e) continues past the decedent's unattained eighteenth birthday, until the maximum statutory entitlement under § 31 is reached.

First, it is worth recounting the nature of parental dependency. A parent has a common law right to all of the earnings of his/her unemancipated minor child. Tornroos v. R. H. White Co., 220 Mass. 336, 341-342 (1915). In turn, the parent has the corresponding duty to furnish the child reasonable support, Dembinski's Case, 231 Mass. 261, 263 (1918), but expenses incurred by the parent on account of the child are not to be set off or deducted from the child's earnings. Id. at 263; Murphy's Case, 208 Mass. 278, 279-280 (1914). These longstanding but somewhat oxymoronical propositions underpin the parental dependency issue involved in this case. The Dembinski court explained:

> The father, upon whom as head of the family rested the entire legal obligation to support his wife and children, . . . as father was entitled as a matter of law to all the wages of the deceased, his minor son . . . [The father retained] an ultimate dependence upon those wages [of his minor son] in performing his obligation as the head of the family to support its members.

Id. at 264. The only difference between the act in its earliest version (see footnote 4, infra), as construed by these decisions, and the current statute applicable to this case, is the conclusive presumption of parental total dependency in § 32(e), which was added by St. 1926, c. 190.[3]

The insurer does not dispute that a claimant parent who establishes dependency *in fact* upon his/her unmarried child under the age of eighteen, is entitled to § 31 benefits that may continue beyond the date on which the child would have become eighteen years old. (Insurer brief, 3-4.) According to the insurer, it is only the *conclusive presumption* of dependency that is subject to termination on what would have been the decedent's

[3] By amending the statute, the legislature removed the hair-splitting calculations of dependency-in-fact, whether partial or total, that the early cases addressed. See, e.g., McMahon's Case, 229 Mass. 48, 52 (1918)("The result is that on this record the dependent is entitled to 27/818.52 (instead of 315.87/818.52) of $10 each week for five hundred weeks from the date of the injury.")

eighteenth birthday, (id.), and the administrative judge agreed. (Dec. 7.) However, we can identify no such plain language in the statute, nor any legislative intent nor, indeed, any rational purpose for such a statutory construction, and we conclude that there is none.

A conclusive presumption is to be regarded as a benefit to the dependent in whose favor the presumption operates. See Van Bibber's Case, 343 Mass. 443, 451, 454 (1962)(court addressed whether dependents were "entitled to the benefit of the conclusive presumption of dependency under G. L. c. 152, § 32"). Ninety years ago, addressing a widow's conclusive presumption of dependency, Chief Justice Rugg wrote:

> [I]t is the situation arising from the existence of a common home, a place of marital association and mutual comfort, broken up and put into peril of hardship or extinction by the husband's death, which is protected by the conclusive presumption of dependency established beyond the peradventure of dispute by the statute. Under such circumstances the widow is given the benefit of an irrefutable assumption that she was supported by the husband. . . . Workmen's compensation acts are founded upon the theory of compensation to dependents when death ensues. This rests upon the fact of dependency. The English act makes dependency a question of fact in all cases. [Citations omitted]. *Our act makes an exception by fixing an absolute presumption of dependency (without regard to what the fact really is) in favor of a wife and of a husband when there is an actual living together. Each is conclusively presumed to be totally dependent upon the other*. It might be extremely difficult to measure the extent of dependency where the wife was earning something beside keeping the house and performing the ordinary wifely duties. Therefore our act says that where there is a real living together the fact of dependency shall not be inquired into; it shall be set at rest by a conclusive assumption.

Nelson's Case, 217 Mass. 467, 469-470 (1914)(emphasis added). Widow Nelson, having satisfied the predicates of the applicable version of § 32, St. 1911, c. 751, Part II, § 7, (which allowed the spouse living with the employee at the time of his/her death the benefit of the very same presumption as has continued to exist since), see footnote 4, infra, was held to be entitled to the full payment of § 31 benefits available at that time.

In another § 32 case, Chief Justice Rugg further emphasized the significance of the widow's conclusive presumption of dependency:

> No provision is made by the act for inquiry into any subsequent change in her condition of dependency. She may become heiress to a fortune after his death and

> thus be utterly independent of the payments provided by the act. But there is no provision for an adjudication of that fact. If such an event should occur, it would be immaterial so far as concerns any procedure under the act. The act provides that the stated payments shall be made to her during the period covered by the award except in the event of her death. Whatever incongruity there may be in continuing payments to a person on the presumption that she is dependent on a deceased husband, when in fact she is receiving ample support from a new husband, is a matter for the Legislature and not the courts to remove.

Bott's Case, 230 Mass. 152, 155 (1918). Of course, the legislature subsequently limited the scope of the conclusive presumption by providing for termination of § 31 benefits upon the remarriage of the surviving spouse. See St. 1922, c. 402, § 1. Nonetheless, all other operative factors of the statute remain the same.[4] The conclusive presumption of dependency has always been construed to be a significant benefit for those who fall within its scope. Hence, we cannot endorse the proposition, argued by the insurer and accepted by the judge, that the conclusive presumption of dependency under § 32(e) should operate to *disadvantage* such claimants (as opposed to claimants who prove dependency in fact) by significantly abbreviating benefit entitlement based on an event (the decedent's eighteenth birthday) that, due to the decedent's death, can never occur.

The several categories of conclusively presumed dependents set forth in § 32 are

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[4] St. 1911, c. 751, Part II, § 7, provided:

> The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee: -
>
> (a) A wife upon a husband with whom she lives at the time of his death.
> (b) A husband upon a wife with whom he lives at the time of her death.
> (c) A child or children under the age of eighteen years (or over said age, but physically or mentally incapacitated from earning) upon the parent with whom he is or they are living at the time of the death of such parent, there being no surviving dependent parent. In case there is more than one child thus dependent, the death benefit shall be divided equally among them.
>
> In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the fact, as the fact may be at the time of the injury; and in such other cases, if there is more than one person wholly dependent, the death benefit shall be divided equally among them, and persons partly dependent, if any, shall receive no part thereof; if there is no one wholly dependent and more than one person partly, the death benefit shall be divided among them according to the relative extent of their dependency.

distinct and not interchangeable. The judge, however, focused on certain words and phrases shared by subsections (c), (d) and (e) of § 32 -- "children" or "child" and "under the age of eighteen years" -- and concluded that "the phrase 'under the age of eighteen [years]' is itself a defining and limiting factor *in all parts* of § 32." (Dec. 6; emphasis added.) The judge viewed the qualifying language as to the attained age of a dependent child as providing for termination of benefit entitlement to a dependent parent based on the never-to-be attained age of the deceased child. In this regard, his statutory analysis missed the mark.

It is settled that a child who is the sole dependent survivor of a deceased employee parent, (§ 32(c) and (d), with further qualifications), is allowed the conclusive presumption of dependency only until he/she attains the age of eighteen. Canavan's Case, 331 Mass. 444, 447-448 (1954). However, contrary to the conclusion reached by the judge, that rule of law does not inform the question of parental dependency under § 32(e). There are two important distinctions in the statutory provisions at issue, neither of which was addressed by the judge or by the insurer. The first distinction relates to when the conclusive presumption of dependency is to be determined. The statute provides in pertinent part:

> The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee:
>
> (a) A wife upon a husband with whom she lives *at the time of his death* . . .
> (b) A husband upon a wife with whom he lives *at the time of her death*.
> (c) Children under the age of eighteen years (or over said age, if physically or mentally incapacitated from earning) upon the parent with whom they are living *at the time of the death of such parent*, there being no surviving dependent parent . . .
> (d) Children under the age of eighteen years (or over said age but physically or mentally incapacitated from earning) upon a parent who was *at the time of his death* legally bound or ordered by law, decree or order of court or other lawful requirement to support such children although living apart from such child or children . . .
> (e) A parent upon an unmarried child under the age of eighteen years, provided, that such child was living with the parent *at the time of* ***the injury*** *resulting in death*. . . .

G. L. c. 152, § 32 (emphases added). Thus, the only conclusive presumption of dependency that attaches as of the date of injury resulting in death -- rather than the date of death -- is that of the subject parental dependency in § 32(e).

This distinction is crucial. As the court noted in Canavan's Case, supra, the conclusively presumed dependency of a sole surviving child who is under the age of eighteen at the time of his parent's work-related death continues past his eighteenth birthday *only if* he is physically or mentally incapacitated from earning. The plain language of § 32(c) and (d) permits no other intepretation. Moreover, if that child is eighteen years old or older when the parent dies, there is no conclusive presumption of dependency, even if the child was under eighteen on the date of injury which later resulted in his parent's death.

On the other hand, under § 32(e), whether a parent is conclusively presumed dependent on a child who dies from a work-related injury is determined, not on the date of the child's death, but at the "time of the injury resulting in death." Thus, if the child satisifies the statutory criteria of being under the age of eighteen, unmarried, and living with the parent *at the time of injury* resulting in death, the conclusive presumption of parental dependency attaches, *nunc pro tunc*, as of the date of the child's subsequent death from that injury, whether or not the child satisfied those same statutory criteria on the date of death. By its plain terms, § 32(e) contemplates entitlement to § 31 benefits of a parent whose child, for example, is injured at age seventeen, but who dies after his eighteenth birthday, or after he marries, or after he is living apart from his parent.

"[T]he use of different language in related statutes dealing with the same subject matter ordinarily indicates that different meanings were intended." Petrucci v. Board of Appeals of Westwood, 45 Mass. App. Ct. 818, 823 n.8 (1998). Moreover, "whenever possible, we [must] give meaning to each word in the legislation; no word in a statute should be considered superfluous." Id., quoting International Org. of Masters, Mates & Pilots, Atl. & Gulf Maritime Region, AFL-CIO v. Woods Hole, Martha'sVineyard & Nantucket S.S. Authy., 392 Mass. 811, 813 (1984). "Where 'the Legislature has carefully employed specific language in one paragraph of a statute . . . but not in others

which treat the same topic . . . the language should not be implied where it is not present.' [citations omitted]." Hallett v. Contributory Ret. App. Bd., 431 Mass. 66, 69 (2000).

This brings us to the second crucial statutory distinction, that of age. With but one exception, potential *dependents* under § 32(c) and (d) must be under eighteen years of age on the date of the parent's work-related death, but the age of the *decedent* on the date of death is irrelevant. Section 32(e), however, has no age requirement for the potential *dependent* -- the surviving parent -- but sets forth three statutory criteria which the *decedent* must satisfy, not on the date of death but at the time of the injury resulting in death. Under the judge's interpretation of the statute, if the minor injured child were to attain the age of eighteen in the period between the injury (qualifying eligibility to the conclusive presumption of parental dependency), and the death (qualifying eligibility to death benefits), the act confers no conclusive entitlement whatsoever on the surviving parent, even though the parent would have satisfied every predicate of the statute. We see no basis for such an arbitrarily limiting construction. See McDonough's Case, 440 Mass. 603, 605 (2003)(care must be taken to avoid reading into statutory language implications not fairly within its terms). We understand the legislature to have used different language in § 32(e) to provide a different qualifying eligibility than under § 32 (c) and (d).

We therefore hold that the full benefit entitlement under § 31 -- 250 times the average weekly wage in the commonwealth at the time of the injury resulting in death -- is available to a parent conclusively presumed to be wholly dependent for support on his/her minor child by virtue of that child being unmarried, under the age of eighteen and living at home, at the time of the injury resulting in death. Such is the entitlement of the claimant parents here. We note that the specific language of § 31 establishing the entitlement applies to all recipients of death benefits, provided that they do not terminate for reasons applicable to any discrete class of dependents, such as remarriage for widows or widowers, and attaining the age of eighteen for minors: "The total payments due *under this section* shall not be more than . . . ." See footnote 1, infra. Conclusively presumed parental dependency under § 32(e), falls within the category of "all other cases of total

dependency" in the fifth paragraph of § 31; it qualifies such dependents for that same entitlement, and terminates only as of the death of both parents.[5] The decision concluding that the § 31 total entitlement language does not apply to the "other dependents" clause of that section is erroneous.

Finally, we note that our construction of § 32(e) today is wholly consistent with case law that still stands as sound precedent. In Murphy's Case, 218 Mass. 278 (1914), the court held that the father of a fifteen year old child, who was apparently killed at work, was entitled to death benefits, "of the minimum compensation provided by the statute; that is, the payment of $4 a week for 300 weeks from September 20, 1912, the date of the injury." Id. at 280. While Murphy predated the conclusive presumption of § 32(e), no meaningful distinction can be drawn on that basis, as discussed above. The point is that the payment of 300 weeks of benefits -- the claimant parent's full entitlement to the applicable death benefits at that time -- extended well past the date of what would have been the child's eighteenth birthday. The same rule was applied in McMahon's Case, supra at 52, and in Gove's Case, 223 Mass. 187, 189 (1916), to name just two others. Our construction simply follows that line of Massachusetts decisional authority.[6]

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[5] The second paragraph of § 32(e) provides:

> If a parent determined to be dependent for support in whole or in part on a child shall die, leaving the other parent surviving, the surviving parent shall succeed to the rights to compensation of the deceased parent, if such parent was living with such surviving parent at the time of the injury resulting in the death of such child.

[6] Other states follow the same approach with regard to death benefits for dependent parents. See, e.g., Glen Irvan Corp. v. Bowman, 14 Pa. Commw. 592, 596 (1974)(payment of death benefits "continuing for indefinite period"); Lajaunie v. Rex Ice Cream Co., 62 So. 2d 203, 203-204 (La. App. 1952)(payment of death benefits for 300 weeks); O'Shea v. Remington-Rand, Inc., 120 Conn. 35, 38-39 (1935)(citing Murphy, supra, for no set-off proposition, death benefits payable "for the statutory period"); Heughan's Case, 129 Me. 1, 2-3 (1930)(citing Murphy, supra, for no set-off proposition, death benefits payable for 300 weeks); In re Peters, 65 Ind. App. 174, 182 (1917)(citing Murphy, supra, death benefits payable for 300 weeks).

Indeed, we have seen nothing in our review of the case law to indicate that the progenitors of §§ 31 and 32 differed from the statutes as they exist today, in any manner that impacts our analysis and approach to construing the statutes.[7]

Accordingly, insofar as the decision on appeal awarded § 31 benefits only for a closed period, until what would have been the decedent employee's eighteenth birthday, we reverse the decision. The insurer is ordered to pay ongoing § 31 benefits from the date of termination until the full entitlement under § 31 is reached, based on the weekly benefit rate of $39.23 ordered by the judge, plus applicable cost-of-living adjustments under §34B and interest under § 50.

In all other respects, the decision is summarily affirmed.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

[7] In addition to the original version of § 32 set out in footnote 4, supra, note the substantial similarity that the original § 31 bears to the present statute, insofar as the overall precepts governing compensation for death are involved:

> If death results from the injury, the association shall pay the dependents of the employee, wholly dependent upon his earnings for support at the time of the injury, a weekly payment equal to one half his average weekly wages, but not more than ten dollars nor less than four dollars a week, for a period of three hundred weeks from the date of the injury. If the employee leaves dependents only partly dependent upon his earnings for support at the time of his injury, the association shall pay such dependents a weekly compensation equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependents bear to the annual earnings of the deceased at the time of his injury. When weekly payments have been made to an injured employee before his death the compensation to dependents shall begin from the date of the last such payments, but shall not continue more than three hundreds weeks from the date of the injury.

St. 1911, c. 751, Part II, § 6. But see Canavan's Case, supra (stating, without analysis, that minor sole surviving dependent's reliance on Cronin's Case, 234 Mass. 5 (1919), for proposition that he was entitled to full § 31 entitlement, was misplaced, as "[t]he statute under consideration there was materially different from § 31 in its present form").

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Frederick E. Levine
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

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